No. 5827

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

JOE FERRIS, FREDDIE MARINO and FRANK FINNEY,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE

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JURISDICTION

This case comes here on appeal from a verdict of guilty rendered against the defendants Ferris, Marino and Finney (since deceased) tried before the Honorable Geo. M. Bourquin, Judge, sitting at Sacramento, California.

SPECIFICATIONS OF ERROR

The specifications of error have been narrowed and consolidated, and are:

I. The evidence is insufficient to support the verdict. (Assignment of Errors No. 13, (R. 24.)

II. The Court erred in admitting in evidence the conduct of defendants Wilson and Sanchez after their arrest, which conduct was not in the presence of appellants. (Assignment of Errors Nos. 1, 2 and 7.)

III. The Court erred in admitting in evidence the testimony concerning the proximity of places along the coast line where small boats could be landed, (Assignment of Errors Nos. 6, 8 and 9) and erred in admitting in evidence testimony concerning the uses to which the rope in the automobile occupied by appellants could be used. (Assignment of Errors No. 10)

IV. The Court erred in instructing the jury that they could from the circumstances of the case without other evidence determine whether a permit had been issued to transport the liquor on the truck. (Assignment of Errors No. 15.)

INDICTMENT

The indictment charges the three appellants with two others (Sanchez and Wilson, who have already pleaded guilty to both counts); the first, with unlawfully transporting a number of cases of liquor and gin fit for and intended for beverage purposes in violation of Sec. 3, Title II of the National Prohibition Act; and second, with conspiracy to commit the same offense in violation of Sec. 37 C. C., and so too these are the only two statutes involved in the appeal.

STATEMENT OF THE CASE

Since the principal argument urged by appellants is directed against the sufficiency of the evidence to sustain the verdict, and the facts are all contained in the brief story of the four witnesses, their testimony is submitted for a summary of the facts, and is as follows:

William A. Shulte, a witness on behalf of the United States testified as follows:

I am a deputy sheriff of Sonoma County and on the 6th day of March, 1929, at 8:30 o'clock in the morning had occasion to stop a truck containing whiskey and gin on a road out from Monte Rio a short way. We were stopped at the Russian River Bridge at Monte Rio around 8:30 in the morning and a G.M.C. truck, about two and a half tons, came across the bridge into Monte Rio and right at the end of the bridge the road was very rough and it crossed the road, and we could hear bottles rattling in the closed part. It was covered with canvas.

We stopped the truck about a mile and a half out of Monte Rio. We came up alongside it and as we pulled up alongside the sheriff blew his siren and then dropped back of the truck and stopped and we stood alongside the truck and ordered the two men out, one getting out on each side. We handcuffed them together. Their action at that time was very nervous. After being handcuffed together, they had got pretty well forward, *they kept edging back toward the rear of the truck, there was about fifteen steps between the car and the place where they had*

been, they kept watching down the road, the way they had come. They edged around the back of the truck. I ordered them back a couple of times and about the time they got back I looked down the road. They got back clear to the (29) right-hand corner of the truck, then I ordered them back again, that is right to the left rear corner of the truck, by the road alongside of the truck. Then I got behind them and I looked down the road myself and I seen this car coming and the men looked very tired, and rough looking, and I said, "For Christ's sake, Doug, here comes the rest of the gang." At that moment I was standing right behind the prisoners who were between me and the coming automobile. The sheriff was standing along the road by the side of the truck, the left side of the truck to my right. The prisoners would be in line between him and the automobile. We were pretty well lined up the road. As the car came up I pulled my gun and the sheriff walked out and waived the car down. The car stopped in the middle of the road at the command of the sheriff. I kept the car covered all the time as it passed me with my gun and the sheriff ordered Williams, the driver of the car, out of the car, and he got out on the left-hand side and I was standing just with the two men then in the middle of the road and as he got out the left-hand side I hollered to him, I said "You better get the other man out," and he walked around the front of the truck with Williams and got the other man by the name of Mays out of the truck. Mays is Marino. Mays is the name he gave us there and later he gave the name of Freddie Ma-

rino. The driver gave the name of Williams to our office and later gave the name of Joe Ferris. They are the two defendants, Marino and Ferris, here charged, the two on my left looking down. After he walked around the right-hand side and opened the door Mays got out and he searched Mays and asked him if he had a gun and he said, "No." Williams said, "I have a gun sheriff, and I will get it for you." The sheriff says, "No, keep your hands out of your pocket, I will get it." And he took the gun, put his hand in his pocket and took out a gun, a 38 Colts loaded. The sheriff took the gun out of his pocket and handcuffed them two men together and (30) says to me—I then walked around the car to the left-side and he says: "Bill, get that rifle." I reached in and pulled it out, muzzle to me and the gun was laying that way, and pulled it out, and I seen it was a Thompson machine gun and said to Doug, "Christ sake, Doug, it is a machine gun." We looked around and he says, "What have you got that thing with you for?" Williams said, *"Well, we haven't got that for you, Sheriff, we have got that for high-jackers."* Mays spoke up a little later and says, *"We have been hunting," and stated that he had taken the machine gun to hunt quail.* He said it seriously, no smiles. The sheriff looked in the rear seat and seen Finney, the man sitting on my right at the table, laying in the back of the front seat, and was asleep or pretended to be, and he ordered him out and he started to get out the right side and he said, "Get out this side." He got out and as he got out he says, "Well, I am not going to

stay here, you have got nothing on me, I am going to get out of here," and started down a little road that was opposite the car, on the right-hand side of the car. I ordered him back. He had gone about 25 or 30 feet, and he came back and stood there a few minutes and then says, "I am going home," and started down the road and right there we give him plain language to stop or he would be brought back right. *Finney tried to get away twice.* We found 151 cases of gin and 19 sacks of Scotch whiskey in the truck. It did not have any United States Government strips stamps on it. It was similar to this whiskey bottle and gin bottle. (31) There were some other different kinds of Scotch whiskey and gin in there. I delivered some of it to a federal prohibition agent, Mr. Goodman. I found a big coil of rope in the automobile. The rope you show me is the same coil of rope. *The truck was painted green. There is green on this rope, on one end of it, exactly the same as the paint on the truck.* That case you show me was in the rear of the automobile. This (displaying a gun), was in that case. The gun was in the front seat laying right on the floor-board. The ram rod was in the case. There was 20 shells in the clip. The clip that was in the gun at the time shot 20 shots. Mays was in the car with the gun right at his feet. The gun was in the same condition as it is now. The gun fires with or without the shot. At that time the stock was on it. At that point where we stopped the automobile and the truck it is forty miles from the Pacific Coast. Within a radius of 40 miles there are ten places along there

that the boats could land. Ten or more. There was some sand in the rear part of the automobile. Other than the rope, gun and sand there was in the automobile, a roll of blankets, a bed for one man, and also some steaks and some provisions. I should say two or three meals. There was some canned goods. I never counted them, four or five. There were no boxes (33) that I saw.

The time between the presence of the two defendants on trial and the overtaking of the truck, was two or three minutes, no more. The truck was a mile or a mile and a half from Monte Rio. With reference to the entrance to Bohemian Grove it was north of a place called Tyrone. In connection with it being south of the entrance to Bohemian Grove, you don't go near the entrance to Bohemian Grove, going towards Duncan's Mills. The road does not follow the river. After leaving Monte Rio it goes in a southeasterly direction on the easterly side of the river. I would approximate the speed of the truck when we first observed it as going very slow. When we overtook the truck I would say the truck was traveling 38 miles an hour.

The sheriff drove his car up alongside where he could see the two men at the cab of the truck, blew the siren and dropped back to the rear when the truck came to a standstill. We were about 15 feet to the rear. I first got out to the right-hand side as he was driving and he got out right afterwards. I then walked up to the truck and had some conversation with the men in it. They then stepped

down. They were ordered down, one from each side. The men were then handcuffed together. Before handcuffing them we searched them. In the meantime the sheriff's car was standing right where it always stood. During the entire period of time I have testified to the sheriff's car was always at the back of the truck. *No other machine or truck passed while we were there before the* (34) *defendants came.* A sedan automobile did not pass. No cars or trucks or any kind passed between the time the Nash came up and the time we stopped the other truck. No automobile went either way. At the time Williams made the statement in connection with the gun, by Williams is meant Ferris, the persons present were Ferris, Marino, the sheriff and myself and the two boys on the truck and Finney was supposed to be asleep on the back seat of the sedan. The statement was made to the sheriff in my presence in response to a question. The sheriff asked him what he had this gun for. He asked that question of Williams. As to whether Mays had the gun, it was in the front seat on the floor. The first time I seen the machine gun was when the sheriff told me to take that rifle out from under the front seat, in front of the front seat. That was after the defendants here on trial were handcuffed. I was on the right-hand side at the rear of the automobile, on the right-hand side when Marino got out of the car. I did not notice the rifle at that time. I was back too far. I (35) handcuffed Marino and Ferris and the discussion in regard to the rifle was right after that. We had not started to Santa Rosa at that time. Mr.

Ferris, the man called Williams, said "That is not for you Sheriff, that is for high-jackers." *The defendant I mentioned trying to run away was Finney.* He never was handcuffed. We just happened to run out of handcuffs, that was the point.

There were no questions asked by the sheriff in my presence of any of the three defendants on trial in connection with whether they knew any of the men on the truck.

Four of the men had on black jeans, black overalls. The fifth one was Wilson. He had on a pair of, I think Khaki pants or whipcord pants and high shoes. We found an extra pair of black jeans where he had been riding, similar to the ones the other men were wearing. The condition of the extra pair of pants was wet and sandy. There was a mattress in the car. I would not say three boxes of provisions. I am kind of faint on how much provisions were in the car, I would not say. There was not a great deal.

E. D. Bills, a witness on behalf of the United States, testified—

I am a sheriff of Sonoma County and about 8:30 on the morning of March 6th I had occasion to seize a truck containing 151 cases of gin and Scotch whiskey near Monte Rio. I should say a mile and a half or two miles out of Monte (38) Rio. We saw the truck pass by and cross over a little bridge near us and heard bottles rattling in it and figured it out and about a mile or mile and a half, something of

that sort, we overtook it and pulled up alongside of it and I gave them the siren and slowed down, they slowed down and I pulled in behind them to the side of the road and stopped and got out of the truck, or out of the machine and went up to the truck. The deputy sheriff and myself both went up to the truck and I said to them, "What have you fellows got here." We ordered them out of the truck and they got out in the road. There was liquor in the truck covered by a canvas. About 151 cases I think of whiskey and several cases of gin, similar to these two bottles you have in your hand. I turned them over to the prohibition agent named Goodman.

These two defendants stepped around in behind the truck. The car was (39) stopped about 15 or 20 feet back of the truck and they stepped in back of the truck or the side of the road so he ordered them back into the road where we were.

Then I was looking at the truck and went to the front end of the truck to see if I could find an identification certificate in it. I looked up the road. The time that elapsed between the time I stopped them and the time I looked up the road along the way they had come was perhaps two minutes, a couple of minutes. I saw a closed car coming. A sedan automobile. It looked to be a Nash, I think they call it a Nash 400. It is a big Nash. Shulte and the two men were near the rear end of the truck. I was near the front end. They were all in the road. The two prisoners were ahead of me and Shulte at the time the car was sighted so they were between me

and the car. As the car pulled up to us Shulte pulled his gun and I think he motioned to them to stop. I am not sure. He covered them with his gun.

I motioned to the car to stop myself, stepped out in the road and they slowed down and I ordered them over to the side of the road ahead of the truck and we all went up to the front end of the car and the driver of the Nash car opened the door and looked out and he ordered them out of the car, told them to get out into the road. We got him out and went around the front end of the car and got the other man out.

The driver gave his name as Frank Williams. His name is Joe Ferris. I see him at the table here. *The other man gave his name as Jack Mays. His name is Fredie Marino.* With respect to what I did to Mays when he got out of the car, I wanted to find out if they had guns and I asked him if he had a gun and he said no and I searched him. The deputy sheriff at that time had covered him with his gun, kept watching the men. I searched May. He said he did not have a gun. I searched Williams as soon as I searched Mays. (40)

He said, "Well, Sheriff, I have a gun and I will get it for you," and started to reach into his overcoat pocket, he was wearing an overcoat, and he reached in there and I took hold of his hand and I said, "Never mind, keep your hand out of your pocket, I will get it myself," and I took it myself.

I then handcuffed these two prisoners together. I then discovered a third man. After he had gone

around to the other side of the machine, the side where Mays was sitting, I saw the stock of a gun lying in the bottom of the car. I thought it was a rifle at the time. As soon as we had gone around the other side of the car I said to Shulte, "Get that rifle out of the car." About that time I looked in the back end of the car and discovered the other man in there apparently asleep and I said, "Have you any guns in here?" and he said, "No." I said, "You get out of there," and he started to climb out the right side of the car and I said, "Get out on this side." And then he got back and came out the same side where we were.

Finney tried to escape. He walked down the road and got started and got about 20 feet before Shulte ordered him back. He tried to escape again. He started up the road. I didn't handcuff him because I did not have any more handcuffs. When I told Shulte to get the gun out of the car he stepped over to the car and started to take the gun out and he was pulling it out with the muzzle toward him on the left side of the car, the driver's side. He said, "My God, it's a machine gun." I said, "What are you fellows doing with this Thompson gun in your car? What is the idea of having a machine gun in here on a trip like this?" Ferris said, "Well, Sheriff, we did (41) not have that for you officers we had it for high-jackers."

Mays said, "We have been up the coast camping. We have been camping." I said, "I suppose you have been camping with this, you have been out for a little

business with this in your camping trip." He said, "Well, we used it for target practice."

I think he said something about shooting quail. That is the gun there. That is the revolver I took from Ferris and that is the ram rod that is within the case. That is the case I found in the back of the car. *I think it is some kind of a musical instrument case.*

All these men had on dark colored clothes. I think their pants were sort of black jeans, I think they call them. All were the same kind but one. There was one man who had, a man named Wilson on the truck, had on a pair of high-topped lace shoes and I think khaki pants. There was a pair of black jeans found in the truck where Wilson was riding.

I saw this rope, Government Exhibit 1, in the car between the front and back seat. The truck was painted green. The sedan dark blue.

An air line would probably be six or eight miles to the coast from where these men were arrested. There are several places a boat could land on the coast. I don't know how many there would be, but a number of places, I think. I know of one other place where I have seen liquor that has been landed. (42)

This automobile was coming from that general direction. I put these three defendants in my automobile and started to town. *Well, Ferris repeated again they did not have the gun for officers, they had it for hi-jackers,* and he wanted to call up some-

body in San Francisco. He wanted to know if I would let him call up somebody. I said, "This is no time now to talk about it, you cannot call up anybody now, wait until you get in to Santa Rosa. You can do it then." He also made a remark about knowing some people in Sonoma County they thought were friends of mine. *Ferris wanted to know if there was not some way of fixing it up. He also said, "I thought the officers in this county were all right to come through here."* I said, "Where did you get any idea of that kind?" I said, "You come through here in broad daylight and right under a man's nose and do you expect him to stand for that?" The machine gun was loaded.

The conversation I just related in connection with fixing this up and referring to mutual friends of himself and myself was, I think, with Mr. Ferris. The reason I say think was because he seemed to be doing most of the talking. Conversation was had by me with Mr. Ferris. He was sitting in the back seat. Finney was sitting in the front seat. I did not fix it up with him.

In this conversation between myself and the defendants on the way in I intended at that time to charge them with the illegal possession of fire arms. That is the only offense I ever charged them with. I think the three of them were charged with the possession of a machine gun. Ferris was also charged with having in his possession a concealed weapon. That is the only charge I have ever placed against these three defendants in Sonoma County. *The num-*

ber of times reference was made to hi-jackers by the defendants was probably twice. The occasion of referring to it the second time was in the course of conversation as I have already stated. As to whether I asked the questions, I don't remember exactly. I think perhaps it is a fact that the first question I asked defendant Ferris was "Have you anything to do with these men on the truck?" When I first apprehended him his answer if I asked him that question was that he did not know them. During the entire time he was in my custody I probably asked him the same question on several different occasions and of course he denied he knew them. I did not believe him.

We placed the charge against the men who had the liquor in their possession at the time and placed the charge in connection with fire arms against these defendants on trial.

I think the following day Ferris was brought before the Justice of the Peace on the gun charge.

In connection with the contents of the car in addition to the gun and rope I think there was some kind of covering. I don't know whether clothes or overcoats, something of that kind, and there appeared to be a paper carton with some provisions of some sort. I don't know the amount of cartons there may have been more than one. I saw one. That was all. I was looking for the gun. There was a box of provisions in the car. I should judge a foot or 15 inches square and they had a few articles of provisions in there. I did not see any other pro-

visions. I did not know there were eighteen steaks that were afterwards used by the jailer in Santa Rosa. I did not know until this morning when I heard that in a conversation out in the corridor. I was pretty busy at that time, I had five men standing there in the road. I had taken a gun off one of them and was looking for other guns.

In connection with the conversations on the way in, in which I was present with the three defendants on trial, Mays may have said something I am not sure about it. I think perhaps he did. In connection with the mutual friends, I don't think there was anybody's name mentioned in connection with it, that is around my neighborhood that I know of. I don't think he mentioned anybody's name there. (46)

In connection with the details of the conversation relative to not pressing the case, there was not much detail to it. He just said, "Isn't there some way to fix this up?" It is a fact in connection with that conversation when I brought these men in to Santa Rosa on the afternoon of the day of the arrest they were each brought separately before the district attorney. I should say it took about two minutes after we had stopped the truck until the arrival of the defendants on trial. I don't mean to say from the time we first saw them.

We first saw the truck at Monte Rio crossing the bridge and I immediately started to overtake the truck. The truck when I first saw it was from here to the end of the courtroom, probably about 50 feet, possibly a little further. I was in my own automobile.

I think the engine was going in my automobile. I am mistaken in my statement that it was not. I think the engine was going. When I first observed the truck it was not going very fast at that time. It had simply come off the bridge across the Russian River at Monte Rio and had a little turn to make to go into the other bridge. There are two bridges there.

The first thing I did after overtaking the truck was sound my siren. When the truck came to a complete standstill I fell in back of it and got out of my car and walked up to the truck driver. I summoned them to step down and asked them what they had in their truck and did not receive any reply. I did not examine the truck at that time. I did not examine the driver's seat until after we got them out. I examined the cab of the car by looking up in there. I did not examine the contents of the truck. I did not examine the contents of the truck until after I got it into Santa Rosa. I went up to the front end of the truck. I don't know whether I stopped right in front of it. Perhaps I did. I was looking for an identification slip to the truck. I did not say I searched it thoroughly because we were busy there and I wouldn't say a thorough search. Then I came back to the two defendants I had arrested and put the handcuffs on them. They were at that time standing in the road. I think at that time they were standing at the side of the truck, not either in front or back. I am not positive on that. I do not think the defendants Sanchez and Wilson were at any time in front of the truck.

As to whether the rifle is a machine gun, it is what we know as a machine gun. That is what it is supposed to be. Thompson gun it is called.

H. O. Neilsen, a witness on behalf of the United States testified—

I am a boatswain in the Coast Guard Service. I am acquainted with the coast along the Sonoma County coast line. There are about ten to twenty places along that coast line where small boats could land. On my vessel and on a vessel a rope such as this one and of that size is used for mooring lines or a tow-line. I would not want that kind for a tow-rope for an automobile and would not be bothered with it because a rope one-half or one-third the size would pull the car out. I do not know these various places are used for running liquor. I said they could, but by that I mean I would do so if I wanted to land anything. The sized boat I would use would be a dory. These are the places where I could come in with a small-sized boat. A dory is a small boat ranging from 14 feet to 25 with a flat bottom, and has three or four seats in it. It is made out of wood.

T. W. Goodman, a witness on behalf of the United States, testified—

I recognize the gin bottle marked "57147." I got it at the sheriff's office at Santa Rosa, from Sheriff Bills. I delivered it to Chemist Love. It was in my possession all the time. The bottle "57146," Scotch Whisky, I got at the Santa Rosa county jail from Sheriff Bills, and I delivered it to Chemist Love.

R. F. Love, a witness on behalf of the United States testified—

I received the bottle marked "57146" from Agent Goodman. I examined the contents which chemically speaking, is whisky fit for beverage purposes. There were no strip stamps or Government stamp. No Government stamp on it at all. I received from Agent Goodman this bottle marked "57147" and examined its contents which is gin. They are both intoxicating liquors fit for beverage purposes.

I

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE VERDICT.

(a) *The evidence in this case is not subject to review.*

The appellants do not have their record before the Court in such shape as to raise any question concerning the insufficiency of the evidence. Consider that portion of the record which follows:

"Mr. Sheets. That is the Government's case.

The Court. Gentlemen of the Jury, we will take a recess until 2 P. M.

(Whereupon the usual statutory admonition was given and recess declared until 2 P. M.)

AFTERNOON SESSION—2 o'clock P. M.

The Court. Proceed, Gentlemen.

Mr. Faulkner. If the Court please, at this time on behalf of the defendants jointly and severally we move the Court for a directed verdict as to each count of

the indictment upon the ground the evidence is insufficient to justify or sustain a verdict as to all or either of the defendants, as to each count in the indictment. At this point counsel for defendants agreed with the Court the motion for directed verdict and a discussion between court and counsel.

The Court. The motion will be denied.

Mr. Faulkner. Exception.

The Court. You may proceed with the defense.

Mr. Faulkner. Defendants rest.

The Court. You may proceed with the argument.

(Whereupon the cause was argued by respective counsel.) (R. 61-62)

The Government rested its case, the defendants made a motion for directed verdict which was denied, they were directed by the Court to proceed with their case, and they failed to renew their motion. It was thus the case went to the jury. The right to question the sufficiency of the evidence upon appeal upon such a a record was thereby waived.

O'Brien Manuel, Federal Appellate Practice, p. 33 and note.

(b) *The evidence is sufficient.*

The appellant has taken the circumstantial evidence of the Government's case to pieces, and then in turn dissected those parts, to support its argument that the evidence is insufficient to support the verdict. Not *the* circumstances, but those component parts of *a* circumstance, have then been separately exposed to the well

known rule that a circumstance as susceptible of an innocent equally with a guilty inference is not evidence of guilt. By that specious method of arguendo reasoning appellants have concluded they were convicted of a crime of which there was no evidence.

In the same way it may be said that the fact of a man waving a baton in his hand indicates nothing, but when the man moves the baton over an empty hat and a rabbit jumps out that circumstance indicates, at least beyond a reasonable doubt, that the man is a magician. The proposition that where evidence in the case is as consistent with the innocence of the defendant as with his guilt it is the duty of the trial judge to grant a directed verdict, or that a fact or circumstance as consistent with innocence as with guilt has no probative value, is the holding of the courts in the cases cited in support of that principle by appellant and is not disputed.

Dickerson v. United States (8th) 18 Fed. (2d) 887, for instance was a case in which the Government proved the existence of a conspiracy to transport liquor and then proved that the plaintiff in error purchased liquor from the conspirators and nothing more, which the Court properly held was but one circumstance which standing all alone as it did failed to prove the plaintiff in error to have participated in the unlawful agreement and an essential of the crime, pointing out that purchasing of liquor was not a crime, and thus that fact alone was robbed of any value in its proof of a conspiracy to transport.

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as another example was a case in which the defendant owned the apartment where the still was found, lived in a nearby adjacent one, paid for the water used by both, and must have known of the existence of the still, which the Court properly held is not evidence that the landlord conspired, but is merely a suspicion that he may have had knowledge of what the real criminal was doing.

Those are typical of the cases cited by appellants in the argument, by which he holds up, one by one, the facts in minutia and claims for them an innocent inference.

Transportation of, or conspiracy to transport, liquor of course, may not be proved by any one of the innocent or dissected circumstances of a Graham truck, or a Nash sedan, or smuggled liquor, or two pairs of black jeans in a truck, or three pairs of the same kind of black jeans in a Nash, or sand on a wet pair of jeans, or sand in a Nash car, or a tow rope for boats in a Nash sedan, or green paint on the axle of a truck, or the identical green paint on the end of a tow rope for boats, or a machine gun loaded and ready for action, or the statement "we had the machine gun for high-jackers."

Each circumstance and object separated and placed by itself ought, of course, to mean nothing. But put those circumstances and objects harmoniously together, as the evidence does, and the transformation is a startling picture of a truck containing smuggled whiskey and its convoy of armed desperadoes.

Thus arranged those facts are: that a truck with a green painted axle driven by two defendants, one wearing black jean pants and containing a pair of wet sand-dusted ones for the other, going at a high rate of speed, with a huge quantity of smuggled whiskey and gin was overhauled on a brush-hidden but well-traveled road within a forty-mile radius of from ten to twenty places on the Pacific Coast where such contraband could have been landed; that these two defendants, instantly placed under arrest, commenced to look anxiously down the road along which they had come and to move for cover behind the truck; that almost instantly from the direction in which the truck had come, and without any other vehicle intervening, came a large Nash sedan in which rode the appellants, all wearing black jeans the same as those of the two defendants on the truck and each of whom on arrest gave a fictitious name; that Ferris, with a revolver in his coat, was driving the sedan and Marino with a machine gun loaded, ready for immediate use, was in the front seat with him, and in the back seat was a huge ninety-foot coil of three-inch rope weighing not less than one hundred fifty pounds, with green paint on the end where the tie would be, identical with the green paint on the axle of the truck containing the whiskey, also sand, food, a saxaphone case for the machine gun, bed roll, bedding and appellant Finney simulating sleep; that the Sheriff of Sonoma County and his Deputy, using the two arrested defendants as a screen, at the point of their guns stopped and searched the Nash; that Ferris said in the presence of all of them, and twice in the presence of appellants, referring to the machine

gun, "Well, we haven't got that for you, Sheriff, we have got that for high-jackers;" That Finney tried twice to make his escape; that on the way to the jail Ferris in the presence of appellants said "I thought the officers in this county were all right to come through here."

The facts and circumstances of the Government's case show clearly and convincingly the appellants' connection with the transportation. The coincidence of time and place and purpose with the presence of appellants—unexplainable on any theory of innocence—are all united. Corroboration was complete with the appellants' admission that they had the gun for "high-jackers." High-jackers are men who steal whiskey. The only whiskey in the vicinity of appellants was on the truck just ahead of them. There was no other whiskey appellants could have been protecting from "high-jackers." After hearing such a case it is not strange that even in the face of instructions which give not the slightest indication of the views of the Court the jury found sufficient evidence of guilt.

II

THE COURT ERRED IN ADMITTING IN EVIDENCE THE CONDUCT OF DEFENDANTS WILSON AND SANCHEZ AFTER THEIR ARREST, WHICH CONDUCT WAS NOT IN THE PRESENCE OF APPELLANTS.

This specification is without force. The conspiracy was still in progress so long as the appellants in the Nash sedan were in the rear of the truck to protect it with the machine gun. Sanchez and Wilson knew this fact, and that the machine gun would be laying

down its barrage momentarily. Consequently they looked in the direction from which their co-conspirators and the whiskey truck's deliverance was to come, and at the same time sought cover to the rear of and behind the truck from the shooting which would commence when the Nash arrived. When the shooting was over the truck would continue. So that the appearance and conduct of Sanchez and Wilson testified to occurred not only while the conspiracy was still in existence but in a very real way was contributing to a furtherance of that conspiracy. Had the Sheriff and his Deputy not placed Wilson and Sanchez between them and the machine gun unquestionably the Sheriff and his deputy would both have been killed.

The ruling of the Court on this evidence does not violate but follows the authorities of *Kuhn v. United States,* 26 Fed. (2d) 463; *Toffanelli v. United States,* 28 Fed (2d) 581, cited by appellants.

Sanchez and Wilson acted as they did in furtherance of the conspiracy at a time when the conspiracy was not only on but approaching the climax for which appellants had the machine gun.

III

THE COURT ERRED IN ADMITTING IN EVIDENCE THE TESTIMONY CONCERNING THE PROXIMITY OF PLACES ALONG THE COAST LINE WHERE SMALL BOATS COULD BE LANDED, AND ERRED IN ADMITTING IN EVIDENCE TESTIMONY CONCERNING THE USES TO WHICH THE ROPE IN THE AUTOMOBILE OCCUPIED BY APPELLANTS COULD BE USED.

On the truck with the green axle along with the whiskey was found a pair of wet sand-sprinkled black

jeans. In the Nash, among other things, were found sand and a huge rope, ninety feet long, about three inches or more in diameter, weighing not less than one hundred fifty pounds, with green paint at the end where the tie would be, identical with that on the axle of the truck. Of what use could an automobile of campers be making of such a rope? Clearly none. Then it became very material to know for what purpose such a rope could be used. An explanation of the huge rope was like the explanation which one makes who understands a machine or trade terms.

Pope v. Filley, 3 Fed. 69 reversed but not on this point.

Such explanations may, of course be, and generally are, made by lay witnesses who understand the subject or object.

Wigmore on Evidence (2nd Ed.) 571.

And the tow rope was not one used by automobiles —it was one used by seamen for towing boats—"*Dories.*" (R. 59)

Fleishman v. Irwin, 5 Fed. (2d) 167, page 169.

But the Nash with the tow rope and sand, and the whiskey truck were on an open road. How could either the appellants in the Nash or the truck with smuggled whiskey use such a rope in such a place? That question was as material and almost as important as it was to know what the appellants were doing, for that would answer in part the business of the appellants at the time. Therefore, evidence which replied to such a question showing the Nash was within forty miles

of from ten to twenty places where boats could land on the Pacific Coast was proper. It did not, "draw the attention of the jury from the actual issues," *Sparks v. Ter. of Oklahoma,* 146 Fed 371, cited by appellants but answered a very proper question in the minds of the jury on a material fact. The ruling upon this question by the trial court was proper. But more than that on the only two specifications of error raised with respect to the evidence the questions were clearly within the wide latitude of discretion accorded to the trial court.

Wigmore on Evidence, 2nd Ed. 561, 571.

IV

THE COURT ERRED IN INSTRUCTING THE JURY THAT THEY COULD FROM THE CIRCUMSTANCES OF THE CASE WITHOUT OTHER EVIDENCE DETERMINE WHETHER A PERMIT HAD BEEN ISSUED TO TRANSPORT THE LIQUOR ON THE TRUCK.

The indictment upon which the appellants were tried charged them in two counts with (1) Transportation of Intoxicating liquor in violation of Sec. 3, Title II, N. P. A., and (2) Conspiracy to transport liquor in violation of Sec. 37, U. S. C. C.

Upon the strength of *Linden v. United States* 2 Fed. (2d) 817, appellants urge that the trial court erred when it instructed the jury as follows:

> "Now, Gentlemen of the Jury, the charge is first: That the defendants engaged in unlawful transportation of intoxicating liquor. There is such a thing as lawful transportation of liquor but it is never legal unless those transporting it have a permit from the Commissioner of Internal

Revenue Department to do so. There is no evidence in this case that the defendant had a permit but you can, if you see fit, ascertain from the circumstances whether or not this was a lawful transportation. You may look at the character of the locality where it was being transported There can be no legal transportation of liquor for beverage purposes at any time. A permit is never issued to transport liquor for beverage purposes. You may look at the nature of the liquor. On its face it appears to be foreign liquor, whiskey. The whiskey is branded "Scotch production," I think, and the gin is branded as Holland production, Dutch production.

"There is a presumption whenever liquor is found in the possession of anyone that the possession is for unlawful purposes, namely for sale or otherwise unlawfully furnishing it to anyone so in so far as this liquor was found in the possession of those defendants who have plead guilty the presumption is that they had possession unlawfully and so they were likewise transporting it unlawfully.

"If from all the circumstances in the case you arrive at a conclusion the liquor was being unlawfully transported then it is for you to say whether these defendants had any part in that act."

It will be seen that the Court was instructing the jury upon the first count in the indictment relating to the substantive offense of transportation in violation of the National Prohibition Act, and in so doing kept within the direction of the *Linden* case which in fact he had before him. No reference is made to the count of conspiracy in this part of the charge to which exception is taken. Concerning its application to the first count of the indictment not even appellants do or could object. So that his specification does not point at or attack the conviction upon the first count.

Coming then to the second and conspiracy count, the proof of the fact of an absence of a permit to transport liquor is not limited to any one form. It may be proved in any manner of several ways. The circumstances clearly indicated that the appellants had no permit to transport the liquor. It was foreign liquor. It was being transported secretly by the two men who were in its immediate custody who had already plead guilty. It was liquor which showed upon its bottles no evidence of a permit—that is, that it was not medicinal liquor—but, on the contrary affirmatively showed itself to be foreign liquor smuggled—with but one use—beverage. The circumstances did in fact clearly establish the total absence of any permit.

The *Linden* case does not announce a rule of evidence or measure the quantum of proof to establish the absence of a permit to transport liquor in a conspiracy case. On the contrary it announces a rule of law that in a conspiracy count there must be affirmative evidence of the absence of a permit. In its instruction the Court did not violate but recognized that rule and the proof of the Government met the issue. This specification is without basis either in law or of fact.

CONCLUSION

The evidence in this case is not only sufficient but clear and convincing of guilt; the only rulings questioned are upon matters almost wholly within the discretion of the trial court upon which it correctly ruled; and the instructions are singularly free from the slightest trace of leaning either way—with the appellants

if at all—and legally supported by the only authority cited by the appellants in their attack upon but the single point. The appeal is without any merit.

Respectfully submitted,

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